

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE SUBSTANTIAL DEVELOPMENT)	SHR2006-0012
SHORELINE VARIANCE)	SHV2009-0008
Application for)	
)	
<i>LMS Blaine, L.L.C.</i>)	FINDINGS OF FACT,
<i>“The Meadows at Semiahmoo”</i>)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant requests approval of a Shoreline Substantial Development Permit to install portions of a residential access road to service residential lots associated with “The Meadows at Semiahmoo Long Plat,” (LSS2006-00006). In addition, the Applicant seeks relief pursuant to a Shoreline Variance to reduce shore setbacks as measured from and to fill portions of shoreline associated wetlands on the subject property in order to facilitate access to the buildable portions of the subject property.

Decision: The requested permits are granted, subject to conditions.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing.

I.

PRELIMINARY INFORMATION

Applicant: LMS Blaine, L.L.C.

Applicant Representative: Francis Eustis – Ronald T. Jepson and Associates

Property Location: Drayton Harbor Road west of Harborview Road

Legal Description: Section 13 Township 40 North, Range 01 West, W.M.
Assessor’s Parcel No. 405113 427181

Adjacent Water Body: Drayton Harbor and its associated wetlands

Shoreline Designation: Rural / Aquatic

Statewide Significance: No

Applicable Shoreline Program Provisions:

SMP 23.10	Purposes
SMP 23.20	Goals and Objectives
SMP 23.30	Shoreline Area Designations
SMP 23.40	Shorelines of Statewide Significance
SMP 23.50	Applicability
SMP 23.60	Shoreline Permits
SMP 23.70	Administration
SMP 23.80	Legal Provisions
SMP 23.90	General Policies and Regulations
SMP 23.100.130	Residential
SMP 23.100.140	Roads and Railways
SMP 23.100.180	Utilities
SMP 23.110	Definitions

SEPA Review: Determination of Non-significance (DNS) issued on July 31, 2009 by
Whatcom County Planning and Development Services (WCPDS)

Legal Notices: Published - May 3, 2007, January 13 and April 15, 2010
Posted – April 15, 2010
Mailed – January 8 and April 9, 2010

Hearing Date: April 28, 2010

Parties of Record:

Ed Legaspi – LMS Blaine, L.L.C.
5805 South Grove Street
Tacoma, Washington 98409

Frances Eustis – Ronald T. Jepson and Associates
222 Grand Avenue, Suite C
Bellingham, Washington 98225

Steven Harmon
4985 Drayton Harbor Road
Blaine, WA 98230

David Willsie
23702 -111th Place West
Woodway, WA 98020

Jon Sitkin
1500 Railroad
Bellingham, WA 98225

Roger McCarthy
Division of Engineering

Chad Yunge and Tyler Schroeder
Planning and Development Services

Exhibits:

- 1 Land Use Application with attachments
 - 1-1 Change of Ownership Memo, dated February 19, 2010
 - 1-2 Supplemental Applications
 - 1-3 Letter of Completeness, May 3, 2007
 - 1-4 Agency Distribution List
 - 1-5 Fire/School District Concurrency Letter
 - 1-6 Preliminary Traffic Info
 - 1-7 Preliminary Stormwater
 - 1-8 Brief Project Description
- 2 Shoreline Staff Report, dated April 19, 2010
- 3 Neighboring Property Comment letters
- 4 Vicinity Map, Preliminary Plat Map, Preliminary Site Plan
- 5 Property Owner Mailing Labels
- 6 Preliminary Plat Staff Report, dated April 16, 2010
- 7 Agency Comments
- 8 DNS, dated July 31, 2009
- 9 Email, dated June 4, 2007 from Oliver Grah to Steven Harmon re: Critical Areas Review
- 10 Letters, dated June 7, 2007 and March 6, 2008, from Jon Sitkin and Fire District 21 to Wayne Fitch
- 11 Whatcom County Code, Old Code, 2005-2007, Chapter 20.20
- 12 Quit Claim Deed

- 13 CCRs
- 14 Conservation / Mitigation Easement
- 15 Preliminary Stormwater Site Plan, dated May 19, 2009
- 16 Large Vicinity Map, Preliminary Plat Map, Preliminary Site Plan (Same as Exhibit 4)
- 17 Wetland Delineation Report, dated December 2005
- 18 Deeds / Lot of Record Application
- 19 Letter of Incompleteness, dated April 4, 2006
- 20 Letter of Completeness for Vesting Only, dated March 15, 2006 from LSS2006-0006 and SHR2006-0012
- 21 Water Verification, April 24, 2007
- 22 Septic Soils Data – Subdivision Application
- 23 Same Maps, different size, as Exhibit 4 and 16
- 24 Aerial Map
- 25 Vicinity Map
- 26 Zoning Map
- 27 SEPA Checklist
- 28 Certificate of Mailing of Notice of Application for SHV2009-0008, dated January 8, 2010
- 29 Certificate of Mailing of Notice of Public Hearing, dated April 9, 2010
- 30 Certificate of Posting, dated April 15, 2010
- 31 Legal Notice of Application, dated May 3, 2007
- 32 Legal Notice of Application, dated January 13, 2010
- 33 Legal Notice of Public Hearing, dated April 15, 2010

- 34 Email Correspondence between Staff
- 35 Email from Jon Sitkin to Tyler Schroeder, dated April 26, 2010 re: signed agreement
- 36 Mitigation Agreement regarding Fire Protection and Emergency Response Service Capital Facility Charge, dated April 28, 2010

II.

The Applicant requests approval of a Shoreline Substantial Development Permit to install portions of a residential access road to service residential lots associated with a request for approval of a Preliminary Long Subdivision Application, "The Meadows at Semiahmoo Long Plat," LSS2006-0006. In addition, the Applicant seeks relief, pursuant to a Shoreline Variance, to reduce shore setbacks measured from and to fill portions of shoreline associated wetlands on the subject property in order to facilitate access to the buildable portions of the subject property.

III.

The Applicant has indicated that the Staff Report is factually correct. The Applicant stated no objection to the Conditions of Approval recommended by Staff. The Findings of Fact and Conclusions of Law of the Shoreline Planner of the Land Use Services Division of Whatcom County Planning and Development Services, as set forth in the Staff Report, Exhibit #2, dated April 19, 2010, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

IV.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Permits for the proposed installation of a residential access road, including shoreline variance relief to reduce the shore setbacks as measured from and to fill portions of shoreline associated wetlands on the buildable portions of a property, located on Drayton Harbor Road in order to facilitate the construction of a five lot clustered single-family residential subdivision.

Findings of Fact and Conclusions of Law for the Shoreline Permits are set forth in the Staff Report, Exhibit #2, dated April 19, 2010. Subject to the Conditions of Approval recommended by Staff, the Hearing Examiner also concludes that the proposal is consistent with the Goals, Policies, and Purpose of the Shoreline Management Act, RCW 90.58, and with the

Goals and Policies of the Whatcom County Shoreline Management Program. The Conclusions of Law adopted by Staff in the Staff Report are incorporated herein as Conclusions of Law.

II.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

A Shoreline Substantial Development Permit and Shoreline Variance Permit are hereby granted to LMS Blaine, L.L.C. for the installation of portions of a residential access road, including shoreline variance relief to reduce shore setbacks as measured from and to fill portions of shoreline associated wetlands in order to facilitate the construction of a five lot clustered single-family residential subdivision, "The Meadows at Semiahmoo," LSS2006-0006, on Assessor's Parcel No. 405113 427181, located on Drayton harbor Road, west of Harborview Road, Blaine, Washington. The permits are granted subject to the following conditions:

1. The use, location and size of the proposed development within shoreline jurisdiction, as illustrated on plan sheets C-1, C-2 and C-3 dated November 9, 2009, shall not be modified or changed in any way without further review by the Shoreline Administrator. No additional wetlands shall be filled. If substantive modifications are proposed, a revision may be required to be approved by the Whatcom County Hearing Examiner and the Washington State Department of Ecology (DOE).
2. The Applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other requirements as determined by WDFW. A copy of the issued HPA shall be submitted along with the required building permit.
3. Future maintenance of the roadway shall be done without the need for toxic and/or hazardous substances. Discharge of such materials into water bodies is prohibited.
4. Utilities shall be installed underground within the proposed roadway within shoreline jurisdiction.
5. Should archaeological materials (e.g. shell midden, faunal remains, stone tools) or human remains be observed during project activities, all work in the immediate vicinity shall stop, and the area shall be secured. The Lummi Nation Tribal Historic Preservation Office (360-384-2298) shall be contacted immediately in order to help assess the situation and determine how to preserve the resources(s). Compliance with all applicable laws pertaining to archaeological resources is required. If human remains are encountered, the Whatcom County Sheriff's Department shall also be contacted. No ground disturbing activity shall be conducted on the subject property until the above agencies have reviewed and provided

comments on the proposal. If additional recommendations are made by such agencies, such measures shall be included as Conditions of Approval.

6. Authorization to conduct development activities shall terminate five (5) years after the effective date, as defined in 23.60.19.A.3, of this shoreline variance, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit and notice of the proposed extension is given to parties of record and the Department of Ecology. Construction shall commence within two years of the effective date of the Shoreline Variance as defined by WAC 173-27-090 (3), provided that the Whatcom County Hearing Examiner may authorize a single extension for a period not to exceed one year based on reasonable factors if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.

NOTICE

In addition to incurring civil liability under Shoreline Management Program Section 23.80.20 and RCW 90.58.210, pursuant to RCW 90.58.220 any person found to have willfully engaged in activities on shorelines of the state in violation of the provisions of the act or the Shoreline Management Program or other regulations adopted pursuant thereto shall be guilty of a gross misdemeanor and shall be punished by a fine of not less than \$25 or more than \$1,000 or by imprisonment in the county jail for not more than 90 days, or by both such fine and imprisonment; provided that the fine for the third and all subsequent violations in any five year period shall not be less than \$500 nor more than \$10,000. Any person who willfully violates any court order, regulatory order or injunction issued pursuant to the Shoreline Management Program shall be subject to a fine of not more than \$5,000, imprisonment in the county jail for not more than 90 days, or both.

NOTICE OF ADMINISTRATIVE APPEAL PROCEDURES **FROM FINAL DECISIONS OF** **THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the Applicant, any opponent of record, or any County department. Appeal to County Council. Within ten calendar days of the date of the written decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

Any party of record may request a closed record review of the Hearing Examiner's Decision, issued under SMP 23.60.15.H.4, by the County Council. Such an appeal shall be filed with the County Council on forms supplied by the County within ten (10) calendar days of the written decision. If appeal is made to the County Council, notice of appeal shall be provided to all Parties of Record at least fifteen (15) days prior to consideration by the County Council. The Council shall meet to review the Hearing Examiner's decision within twenty-one (21) days of transmittal thereof, at which time it may approve or disapprove the application, or remand the matter to the Hearing Examiner.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830 and Section 23.60.15.H. A copy of this document is available for review at the County Council Office. After an appeal has been filed and the Council Office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 3rd day of May 2010.

Michael Bobbink, Hearing Examiner



April 19, 2010

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of Ed Legaspi for a Shoreline Substantial Development and Shoreline Variance Permit	SHR2006-00012, SHV2009-00008 FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
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I. SUMMARY OF APPLICATION AND RECOMMENDATIONS

Application: The applicant requests approval of a shoreline substantial development permit to install portions of a residential access road to service residential lots associated with the Meadows at Semiahmoo Long Plat (LSS2006-00006). In addition, the applicant seeks relief pursuant to a shoreline variance to reduce shore setbacks measured from, and to fill portions of, shoreline associated wetlands on the subject property in order to facilitate access to the buildable portions of the subject property.

Recommendation: Staff recommends approval of the requested permits subject to modifications and conditions outlined within this staff report.

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: Ed Legaspi – LMS Blain, LLC
5805 South Grove Street
Tacoma, Washington 98409
V5G 0A3

Applicant Representative: Francis Eustis – Ronald T. Jepson and Associates
222 Grand Avenue, Suite C
Bellingham, Washington 98225

Property Location: Drayton Harbor Road west of Harborview Road

Legal Description: Section 13 Township 40 North, Range 01 West, W.M.
Parcel(s) #: 405113427181

Adjacent Water Body: Drayton Harbor and its associated wetlands

Shoreline Designation: Rural / Aquatic

Statewide Significance: No

B. PROCEDURAL INFORMATION

Applicable Shoreline Program Provisions:

SMP 23.10	Purposes
SMP 23.20	Goals and Objectives
SMP 23.30	Shoreline Area Designations
SMP 23.40	Shorelines of Statewide Significance
SMP 23.50	Applicability
SMP 23.60	Shoreline Permits
SMP 23.70	Administration
SMP 23.80	Legal Provisions
SMP 23.90	General Policies and Regulations
SMP 23.100.130	Residential\
SMP 23.100.140	Roads and Railways
SMP 23.100.180	Utilities
SMP 23.110	Definitions

SEPA REVIEW: Determination of Non-significance (DNS) issued on July 31, 2009 by Whatcom County Planning and Development Services (WCPDS).

III. FINDINGS

The applicant is requesting approval of a shoreline substantial development permit to install portions of a roadway to provide access to residential lots associated with the Meadows at Semiahmoo Long Plat. In addition, the applicant requests relief of shore setback provisions from, and to fill portions of, shoreline associated wetlands on the subject property in order to facilitate construction of the roadway.

The subject property consists of approximately 28-acres of undeveloped land fronting on Drayton Harbor Road west of the intersection of Harborview Road. The property consists of former agricultural land overgrown with pasture grasses. The northern portion of the subject property fronts on the shoreline of Drayton Harbor and numerous shoreline associated wetlands are located throughout the northern portion of the site to the east of Drayton Harbor Road, which represents the only access to the subject property.

The jurisdiction of the shoreline management program includes shoreline associated wetlands labeled Wetland A North, Wetland B, Wetland C, and Wetland E on the site plans submitted by the applicant dated November 9, 2009. This determination was made by Ms. Susan Meyer of the Washington State Department of Ecology (DOE) at the request of the former proponent of the Meadows at Semiahmoo long plat application.

Shore setbacks apply to shoreline associated wetlands that fall within 200-feet of the ordinary high water mark (OHWM) of Drayton Harbor as depicted on the site plans pursuant to 23.90.60. Due to

the configuration of the shoreline wetlands on the property, observance of such setbacks would leave no area available to gain access to the southern portions of the property where the new residential lots are proposed within the pending plat. The applicant has requested relief from such setbacks in order to construct the roadway in the least damaging areas of the wetland setbacks. The applicant also proposes to fill small portions of Wetland A North and Wetland C in order to construct the roadway. Such wetland fill also requires approval of a shoreline variance.

IV. CONCLUSIONS

Shoreline Substantial Development

Section 23.60.171 states that a substantial development permit shall be required for all proposed use and development of shorelines unless the proposal is specifically exempt from such requirements pursuant to one or more of the listed exemptions outlined in 23.50.31. The proposed roadway development does not qualify for review via an exemption from substantial development permitting. As such, a substantial development permit is required.

According to 23.172, in order to be approved, the decision maker must find that the proposal is consistent with the following criteria:

1. All regulations of the SMP appropriate to the shoreline designation and the type of use or development proposed shall be met, except those bulk and dimensional standards that have been modified by approval of a shoreline variance under SMP 23.60.180;
2. All policies of the SMP appropriate to the shoreline area designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated; and
3. For projects located on shorelines of statewide significance, the policies of Chapter 4 shall be also adhered to.

General and use-specific policies and regulations associated with roadway development are found within Sections 23.90 and 23.100.140, respectively. The following policies and regulations are appropriate for the type of use and development being proposed:

Accessory Uses

23.90.14 – Accessory development or use which does not require a shoreline location should be sited inland away from the land/water interface and landward of the principal use, unless no alternatives exist. Such uses include, among others, parking, service buildings or areas, access roads, utilities, signs and storage of materials. Use and development activities which are accessory or related to the primary use should be consistent with all applicable policies and regulations of Chapter 23.100 relevant to such activities.

The residential access road is accessory to the Meadows at Semiahmoo residential long plat. According to the applicant, no alternatives exist to access the developable portions of the subject property. The roadway configuration has been sited and designed to represent the minimum necessary impact to wetlands and their respective setbacks and thus the only alternative.

Hazardous, Sensitive or Unsuitable Areas

23.90.15 - Natural features or conditions associated with shorelines are often environmentally sensitive or potentially hazardous to development. Such areas and features include natural

wetlands, accretion shoreforms, floodways, alluvial fans, steep slopes, unstable soils, ground and surface water, fish and wildlife habitat and shore processes. Many such areas are often unique or scarce, highly productive biologically, visually attractive, valuable for public access, open space or recreation, and in many instances hazardous or otherwise unsuitable for intensive use or development. Such areas should be maintained in a natural condition. In limited instances where alternatives are infeasible, some minimal development activity may be allowed, provide optimum mitigation is achieved. Such development, if properly conducted, should not impair natural features, recreation or aesthetic values or result in hazardous conditions, and should adequately protect resources over the long term.

23.90.43 – Development shall be located, designed, constructed and maintained to prevent hazardous conditions and to substantially conserve wetlands, fish and wildlife habitat, shore processes and other sensitive natural features which are valuable in the region. Professional design of development may be required by the Administrator in order to protect shore features and other users and to ensure such development is not subject to nor creates hazardous conditions unsuitable to development.

23.100.140.16 – Road development should not generally be located on, over, or waterward of erosional of feeder bluffs, driftways, accretion shoreforms, flood plains, coastal flood hazard areas, estuaries, or natural wetlands. Neither should unrelated transport development be located in public recreation areas or on significant natural, historic or archaeological sites. If development in such locations is necessary, design and construction should aim to prevent or minimize harmful interference with normal movement of ground water or floodwater, as well as prevent additional erosion.

The proposed long plat configuration and associated accessory development, including the proposed roadway, has been reviewed and approved by Whatcom County Planning and Development Services (WCPDS) pursuant to the Whatcom County Critical Areas Ordinance (CAO). In addition, the proposal was vetted and granted approval pursuant to the Washington State Environmental Policy Act (SEPA). Mitigation has been designed and approved by WCPDS to adequately compensate for the unavoidable wetland fill and buffer reductions pursuant to the CAO. A permit has also been obtained for the wetland impacts from the United States Army Corps of Engineers (ACOE).

Site Preparation

23.90.16 – Land clearing, grading, filling, and alteration of natural drainage or other features should be limited to the minimum amount necessary to accommodate approved development. Surfaces cleared of vegetation should be immediately re-vegetated with native or compatible plants. Landscaping projects requiring substantial earth modification and grading should be carefully and professionally designed to prevent maintenance problems or damage to shore features and processes.

23.90.44 – Land clearing, grading, filling, removal of vegetation and alteration of natural features shall be kept to the minimum that is reasonably necessary to accommodate approved development. Disturbed areas shall be re-vegetated as soon as possible.

23.100.140.22 – Transport development on shorelines should be designed to generally follow natural topography in order to hold cuts and/or fills to a minimum. Earth cut slopes and other exposed soils should be placed, compacted, and planted or otherwise stabilized and protected from surface runoff; native plants are preferred. In development close to shorelines, a buffer of native plants and undisturbed soil or rock should be preserved or restored, with sufficient width to protect shore features and other users.

The above regulatory provisions were addressed through review by the CAO Technical Administrator (TA) through review and approval recommendation of the Meadows at Semiahmoo Long Plat.

Geo-Hydraulics

23.90.17 – Development should be located, designed, constructed and maintained so that natural erosion, sediment transport, and water circulation and accretion processes are not significantly disrupted. The physical integrity of the shore process corridor should be maintained in its natural state to the greatest extent feasible. Necessary development should have minimal or no adverse impact upon valuable physical shore features and processes.

23.90.45 – Shoreline use and development activities shall not unnecessarily disrupt natural shore processes. Disturbances from construction, heavy equipment use or removal of driftwood, flood debris, or other materials from the shoreline area shall be kept to a minimum consistent with this SMP.

23.100.140.14 - Road development should be located whenever possible away from the land/water interface so that damage to shore processes and valuable shore features does not occur, and so that defense works, substantial cuts and fills, or cantilevering are not necessary. Water body crossings where necessary should also be designed consistent with these objectives; bridges and their approaches should be oriented perpendicular to the shoreline whenever possible.

The road design represents the minimum necessary impact to wetlands and setbacks on the property. The design incorporates filling of a narrow linear wetland feature that appears to convey surface waters in a southwesterly direction on the subject property during the wet season. The applicant proposes to culvert this watercourse so that continuity of surface water flows will remain unchanged. Mitigation has been designed by the applicant and approved by WCPDS for the unavoidable wetland fill which should result in no significant effect of existing geo-hydraulics on the subject property.

Water Quality

23.90.18 – Location, construction, operation, and maintenance of all shoreline use and development activities should maintain or enhance the quality of surface and ground water over the long term, and restore water quality if degraded. As a minimum, state water quality and all other applicable standards should be adhered to.

23.90.46 – State water quality and all other applicable standards shall be adhered to. Water quality of ground and surface waters shall not be significantly degraded.

23.100.140.19 – Concentrated runoff associated with road and parking drainage along shorelines can be a significant cause of damage to shore features and property values. Adequate measures should be incorporated in road design and maintenance to prevent or mitigate resulting erosion, slides, loss or property, sedimentation and pollution. Routes parallel to drainage direction, natural character catch basins, absorptions fields, interceptor tile drains, and other effective means should be required.

23.100.140.32(a) – Land transport development shall be carried out in a manner which does not lower State quality standards for affected waters. To achieve this objective, the County may require effective, reasonable measures be taken to preserve water quality including but not limited to:

1. A buffer of undisturbed or restored soil and vegetation between development and shorelines.

2. Drainage structures or other means to control surface runoff and ground water movement which may be accelerated, concentrated, or diverted by such development.

Through review of the long plat application, Whatcom County Public Works – Engineering Division (Engineering) has approved a stormwater design associated with the proposed development. Such design is consistent with applicable Whatcom County development standards which adequately address the above regulations. In addition, the project was reviewed and determined compliant with County Special Watershed Management Overlays associated with the Drayton Harbor Watershed. The long plat has been conditioned that appropriate measures be installed during construction to abate potential sedimentation from runoff during construction activity on the property.

Hazardous/Toxic Materials

23.90.19 – When chemical fertilizers, pesticides or other toxic materials are use in shoreline areas, extreme caution should be observed to prevent contamination of water and soils and adverse effects on valuable plant, fish and animal life. There should be no spraying over water bodies or application on land where direct runoff of chemical-laden water to water bodies or aquifer recharge areas will occur. A chemical free buffer strip should be maintained along the OHWM of all wetlands, streams and water bodies.

23.90.47 – Release of hazardous, toxic or acid-forming materials which are likely to degrade surface or ground water quality or damage other resources is prohibited. No airborne release of chemicals shall be permitted over shorelines. Wood or piling treated with pentachlorophenol or other similarly toxic substances shall not be used below the OHWM of streams, lakes or wetlands.

This permit recommendation has been conditioned that future maintenance of the proposed roadway be conducted without the use of hazardous and/or toxic chemicals and that materials utilized for fill be untreated.

Fish and Wildlife

23.90.20 – All shoreline use and development activities should be located and operated so as to provide long term protection of fish and wildlife resources, and their various habitats. Maintenance and enhancement of fisheries should be given priority consideration in reviewing shoreline use proposals which might adversely impact fisheries habitat, migratory routes and harvest of significant fish or shellfish species. Alternative locations or designs should be seriously considered for such proposals if such potential adverse impacts are significant. Shoreline having banks, beaches and beds critical to preservation or enhancement of the fisheries resource base should be maintained or restored to a productive natural condition whenever possible.

23.90.48 – Design, location, construction and operation of all shoreline use and development activities shall not unnecessarily impact fish and wildlife resources and their respective habitats over the short or long term. Development in critical wildlife habitat areas identified by the Washington Department of Fish and Wildlife (WDFW) shall not be permitted unless adequate mitigation of impacts can be provided. Development is also subject to the provisions of the critical areas ordinance (CAO).

As stated previously, the entire plat development has received approval by the CAO TA with an approved mitigation plan. In addition, a habitat conservation plan was approved to protect an existing heron colony located near the southern portion of the subject property.

Views and Aesthetics

23.90.21 – Development should not detract from shoreline scenic and aesthetic qualities which are derived from natural or cultural features, such as shoreforms, natural vegetative cover, scenic vistas, diverse landscapes, historic structures, and rural and wilderness-like shores. These and other scarce or valuable features should be conserved or enhanced by development and utilized for open space, fish and wildlife habitat, public access or recreation purposes. Over water construction should be minimized, site restoration should be required, visual compatibility in design of development within its surroundings should be encouraged and scenic views should not be obstructed. Also, protection of the view of the shoreline from the water surface should be considered.

23.90.49 – Development shall be designed, located, constructed and maintained to avoid obstruction of views or other adverse impacts on shore scenery and aesthetic quality. Where such impacts are unavoidable, development may be approved where significant public access areas or facilities are provided or other means of enhancing the public's enjoyment of visual and aesthetic resources in the area are provided.

No adverse view impacts were identified as a result of construction of the proposed roadway. Future residential development will be located on the southern portion of the subject property; a substantial distance from Drayton Harbor. The roadway will also be buffered from views on Drayton Harbor through maintenance of existing vegetative screening on the waterfront portion of the subject property.

Public Access

23.90.22 – Physical or visual access to shorelines should be required as a condition of significant development activities, when the proposal would either generate a demand for specific forms of such access, and/or would impair existing, legal access facilities and/or rights.

23.100.140.20 – Public access should be provided to shorelines where safe and compatible with the primary and adjacent use, or should be replaced where transport development substantially impairs lawful public access. Viewpoints, parking, trails and similar improvements should be considered for all road construction projects in shoreline areas, especially where a need has been identified.

Through review of the proposal, no nexus exists for the requirement of public access on the subject property. Construction of the roadway does not impair existing rights of public access nor does it create a demand for such access. A community access is being provided along the shoreline for passive recreation by future owners of the lots associated with Meadows at Semiahmoo.

Utilities

23.90.24 – Intensive developments should only be located in areas where adequate utilities are already developed or planned officially, or may be provided without significant damage to shore features. Appropriate materials and techniques should be utilized to protect natural features and other users. Exterior finish of structures and materials should be of a non-reflective character compatible with the surrounding area.

23.90.52 – Sewage and garbage disposal facilities shall be provided as required by the local Health Department and zoning regulations. Storm drainage facilities for upland development shall be provided as required by the County Engineer consistent with applicable drainage and development standards. All floodlighting shall be designed and operated so as not to emit unreasonable or unnecessary glare, to illuminate nearby properties or to create hazards to traffic. Within 100-feet of the OHWM and natural wetlands, new distribution and on-site electrical and communication wiring shall be placed underground; provided that one stub utility pole may be used if existing distribution

lines are overhead. For purposes of crossing water bodies, overhead transmission or distribution lines and on-site electrical communication wiring may be permitted within 100-feet of the OHWM and natural wetlands and over bodies of water as a conditional use.

Adequate sewerage, water service, garbage service etc. is subject to review by the Whatcom County Health Department who has reviewed the long plat application and supports approval based on conditions. This approval recommendation has been conditioned that any utilities to be installed within shoreline jurisdiction be placed underground within the roadway.

Setbacks

23.90.60 – Table 23.90.60 establishes the minimum required shore setbacks for development. Shore setbacks shall be measured from the OHWM; provided that, on natural wetlands, such setbacks shall be measured from the edge of the wetland. No shore setback shall exceed the geographic limit of shoreline jurisdiction.

Table 23.90.60 requires a 50-foot setback for local or minor access roadways within the rural shoreline designation. Please refer to the variance portion of this staff report for discussion on setbacks.

Landfill and Excavation

23.100.140.32(c) – Except for shoreline crossings in locations consistent with this program, landfill or side-cast in water bodies or on natural wetlands, estuaries, accretion shoreforms, tidelands, shorelands, or on other scarce or sensitive shorelines for road development including accessory uses is prohibited.

This approval recommendation supports wetland fill of only those areas necessary for crossing by the proposed roadway. No additional sidecast or fill in wetlands is authorized.

Defense Works

23.100.140.32(e) – Protection of road and railway development from erosion on accretion shoreforms, natural wetlands, estuaries, feeder bluffs, or high-energy driftways shall be by flexible, natural appearing means, such as protective berm development, beach feeding, or vegetative stabilization, which are compatible with local geo-hydraulic conditions. Rigid, unnatural appearing works are prohibited at such locations.

The shoreline wetlands in this case are low energy and no defense works are currently proposed nor are anticipated to be necessary in the future to protect the roadway development.

Roadway Development – Preferred Design

23.100.140.17(a) – On unstable, low-bearing capacity soils, natural wetlands or flood plains, across wide streamways or natural beaches, pile supports are strongly preferred over ripped and bulkheaded fills.

23.100.140(c) – Bridges or bottomless culverts are preferred over culvert and causeway fills on all shorelines because of much less negative impact on shore features including fish and wildlife and movement of surface and floodwater.

Two wetland areas are proposed to be filled in order to accommodate construction of the roadway development. A small portion of Wetland C is proposed to be filled in order to keep the bulk of the

roadway development as far as possible from Wetland E and portions of Wetland A North which have a direct connection to Drayton Harbor through a small estuary. These wetlands are the highest functioning wetlands on the property and are the focus of most of the mitigation effort.

A portion of Wetland A North is proposed to be filled for the purpose of crossing to the areas on the southern portion of the property where wetlands are absent. The area subject to the crossing measures two to three feet in width. According to the applicant, bridging the crossing is neither cost effective nor beneficial given the limited span needed to facilitate the crossing. A culvert has been proposed to adequately convey surface waters during the wet season according to the applicant. Staff is in agreement that this is an appropriate design in this case.

Shoreline Variance

According to 23.60.180, the purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in the SMP where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the SMP would impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020. A variance will be granted in any circumstance where denial would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances, extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.

According to 23.60.183, variances may be authorized, provided the applicant/proponent can demonstrate all of the following criteria:

1. That the strict application of the bulk or dimensional criteria set forth in the SMP precludes or significantly interferes with a reasonable permitted use of the property;
2. That the hardship described in 23.60.181 is specifically related to the property, and is the result of conditions such as irregular lot shape, size, or natural features and not, for example, from the applicants own actions;
3. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects on adjacent properties or the shoreline environment;
4. That the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief;
5. That the public interest will suffer no substantial detrimental effect; and
6. In the granting of all variances, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if variances were granted to other developments in the area where similar circumstances exist, the total of the variances should also remain consistent with the policies of RCW 90.58.020 and should not produce significant adverse effects to the shoreline environment or other users.

Staff responses are numbered accordingly below:

1. As mentioned previously within this staff report, a 50-foot setback, as measured from the delineated wetland edges within shoreline jurisdiction, apply to roadway development within the rural shoreline designation. Application of such prescriptive buffers completely obscures access road development of any kind along Drayton Harbor Road. According to the applicant, no other access is feasible to construct any permitted use on the southern portion of the property where no wetlands exist. Given the fact that a shoreline variance would be necessary in order to develop one single-family residence on the parent parcel, the situation here does interfere with reasonable permitted use of the property.

2. The hardship stated here is due to the configuration of the subject property and its proximity to substantial wetland areas on the subject property. In addition, Drayton Harbor Road represents the only legal access to the subject property. Such issues are clearly not due to the applicants own actions.
3. The proposed design of the roadway has been developed in accordance with Whatcom County Development Standards as supported by Engineering. In addition, a stormwater design has also been developed and supported by Engineering. The final road layout was designed with input from the CAO TA and mitigation has been designed and approved for the unavoidable impact. Therefore, the proposal is consistent with this variance criterion as the minimum necessary to afford relief with no adverse impacts to the shoreline development in the long term.
4. See 3.
5. No detrimental impacts to the general public interest were identified during the course of staff review. Comments were received from neighboring property owners which are address later within this staff report and within the long plat approval recommendation.
6. The impacts to wetlands and their respective setbacks/buffers have been minimized to the extent practicable in order to accommodate access to buildable areas of the subject property. A mitigation plan and its associated maintenance and assurances have been designed for such impacts that should result in a no net loss of shoreline/wetland ecological functions. As such, approval of similar projects where such mitigating measures have been demonstrated would not represent an adverse cumulative impact to the shoreline environment.

V. PUBLIC COMMENTS

On July 14, 2009, staff received the following comments from Steven Harmon of 4985 Drayton Harbor Road:

“Drainage has been and is poor on the 31-acreas that they are trying to develop. Road restrict and create new drainage areas. If they are not done right they are a nightmare. The 5-acres which I own with my brother Wayne, my sister Judy and myself during the wet months a pond about ¾ acres develops in the southeast portion of the property. Since the owners – Meadows at Semiahmoo have owned the property, drainage is almost to me seeing a lawyer for legal action, it’s that bad. My property is in the middle of a drainage system, the water runs thus our property and stops when it comes to the property of the Meadows at Semiahmoo during and when it rains heavy and during the wet season.

Other concerns about the ownership of Meadows at Semiahmoo, they currently have not moved the grass on the fields of the 31-acres, they have done anything to the property except surveys and engineering work. It’s a fire trap!

Concerning the shoreline, with what I have seen, they are not good stewards of the land. I am not impressed or pleased by how tough the place looks.”

On January 14, 2010, staff received additional comments from Steven Harmon:

“My main concern is drainage, how much more water will flow down to my 5-acres (owned jointly with sister and brother)” So far the airplane hasn’t got off the ground. When are they going to build?”

The subject property and adjacent sites are located within an area of numerous linear wetland features that generally trend to the southwest toward Drayton Harbor. Such wetland areas are dynamic and may naturally change overtime. Stormwater generated from the proposed long

plant development, including the road, have been reviewed and approved by WCPDS and Engineering. If installed as designed, the project should not result in a change in overall natural drainage on the subject property. The applicant does not propose, nor does the WCPDS support any additional changes to natural drainage patterns in the area of the subject property.

On January 15, 2010, staff received the following comments from Dale Keeler of 8585 Harborview Road:

"Please notify when hearing is to be held".

Staff forwarded Mr. Keeler's information to the Office of the Hearing Examiner as a party of record.

On January 29, 2010, staff received the following comments from Marta Martin of 4211 Beach Bluff Road, Carlsbad, California:

"Please! Please! Do not disturb the wetlands! Look what happened to southern California."

The issues of wetland disturbance are adequately addressed within the permit record and this staff report.

On February 8, 2010, staff received the following comments from Adele Cameron at 8585 Harborview Road:

It is well known the Meadows is very wet and someone is planning to put an above the ground septic system. Where will it be located? Would appreciate a printed version of exactly the proposed access roads area and size. How close to our property will the road be?"

The long plat was reviewed by the Whatcom County Health Department. In order to be approved, the plat must demonstrate that adequate measures can be emplaced to handle sewage generated for future development.

VI. AGENCY COMMENTS

On July 2, 2009, staff received comments from the Lummi Nation Tribal Historic Preservation Office (LNTHPO) recommending a professional cultural resource assessment of the proposed project area prior to commencement of ground-disturbing activities on the subject property.

An Archaeological Assessment of the Meadows at Semiahmoo was received by WCPDS on May 21, 2009 by Drayton Archaeological Research (DAR). The survey was done by the request of the United States Army Corps of Engineers in association with the proposal to fill portions of the on-site wetlands to construct the access road.

The DAR report does not recommend additional studies or monitoring be conducted on the subject property as a result of the proposed long plat development. This permit recommendation has been conditioned to address the protocol for inadvertent discovery of such resources during construction as recommended by DAR. Such conditions have been forwarded to the Washington State Department of Archaeology and Historic Preservation and the affected tribes to comment. Such comment period is still pending and as such, this recommendation has also been conditioned that no ground disturbing activity be conducted on the subject property until the comment period has expired. If additional conditions are recommended by the above referenced agencies, such

conditions shall be adhered to in addition to those recommended within this staff report.

VII. RECOMMENDATIONS

Based on the above findings and technical review, Staff recommends approval of the request for a Shoreline Substantial Development and Shoreline Variance, subject to the following conditions of approval in addition to those required by the Meadows at Semiahmoo Long Plat:

- 1. The use, location and size of the proposed development within shoreline jurisdiction, as illustrated on plan sheets C-1, C-2 and C-3 dated November 9, 2009 shall not be modified or changed in any way without further review by the Shoreline Administrator. No additional wetlands shall be filled. If substantive modifications are proposed, a revision may be required to be approved by the Whatcom County Hearing Examiner and the Washington State Department of Ecology (DOE).*
- 2. The applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other requirements as determined by WDFW. A copy of the issued HPA shall be submitted along with the above required building permit.*
- 3. Future maintenance of the roadway shall be done without the need for toxic and/or hazardous substances. Discharge of such materials into water bodies is prohibited.*
- 4. Utilities shall be installed underground within the proposed roadway within shoreline jurisdiction.*
- 5. Should archaeological materials (e.g. shell midden, faunal remains, stone tools) or human remains be observed during project activities, all work in the immediate vicinity shall stop, and the area shall be secured. The Lummi Nation Tribal Historic Preservation Office (360-384-2298) shall be contacted immediately in order to help assess the situation and determine how to preserve the resources(s). Compliance with all applicable laws pertaining to archaeological resources is required. If human remains are encountered, the Whatcom County Sheriff's Department shall also be contacted. No ground disturbing activity shall be conducted on the subject property until the above agencies have reviewed and provided comments on the proposal. If additional recommendations are made by such agencies, such measures shall be included as conditions of approval.*
- 6. Authorization to conduct development activities shall terminate five (5) years after the effective date, as defined in 23.60.19.A.3, of this shoreline variance, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit and notice of the proposed extension is given to parties of record and the Department of Ecology. Construction shall commence within two years of the effective date of the Shoreline Variance as defined by WAC 173-27-090 (3), provided that the Whatcom County Hearing Examiner may authorize a single extension for a period not to exceed one year based on reasonable factors if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.*

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